Empire Holdings Ltd v Ithmaar Development Co Ltd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-441–03 OF 2022
MARIANA YAHYA, AZMAN ABDULLAH AND AZMI ARIFFIN JJCA
27 SEPTEMBER 2024

Civil Procedure — Trial — No case to answer — Whether plaintiff failed to prove its case — Whether trial court was right in dismissing plaintiff's suit — Whether trial court was justified in enforcing 'unless order' that compelled plaintiff to close its case after plaintiff repeatedly failed to produce its main witness to testify — Whether trial court was right in refusing further adjournment as plaintiff's main witness deliberately went abroad despite knowing of pre-fixed trial dates

The appellant charged its shares in the fifth respondent ('R5') to the first respondent ('R1') to secure the latter's grant to it of a USD83m loan ('the facility'). The facility was also secured by a personal guarantee executed by the appellant's sole shareholder, TSM, in favour of R1. When both the appellant and TSM defaulted in repaying the sums payable under the facility, R1 filed a civil suit against them in London, obtained a default judgment for the amount owing ('the UK judgment') and registered the same in the High Court at Kuala Lumpur for enforcement purposes. R1 then filed proceedings to declare TSM a bankrupt and then took steps to sell off the charged shares in R5 to the third respondent ('R3') at 18 sen per share. The shares were sold by R1's nominee, the second respondent ('R2') to R3 pursuant to a share sale and purchase agreement ('SSPA'). R3 fully paid R1 for the shares and became the registered owner thereof. Following the share sale, the appellant filed an action against all the respondents claiming that: (a) it was not notified of the share sale; (b) the shares were sold at a gross undervalue and, thereby, the first to the fourth respondents had acted in concert to injure the appellant; (c) the share sale breached an agreement that TSM had with one Abdullah Taleb (representing R1 and R2) that the appellant would be allowed to redeem the shares by paying USD54m within two weeks and upon a token amount being paid immediately; (d) the fourth respondent ('R4') had used insider information to enable R3 to acquire the charged shares at an undervalue and had thereby breached the Capital Markets and Services Act 2007 ('the CMSA') and the Malaysian Code on Take-Overs and Mergers 2016; and (e) R3 was not a bona fide purchaser of the charged shares as it had notice of R1's, R2's and R4's alleged breaches of the law. In the action, the appellant sought to declare null and void the sale of the charged shares to R3. The appellant obtained an ex parte injunction to prevent the completion of the SSPA but when it was set aside at the inter-partes hearing, the appellant filed an O 14A application

('encl 194') under the Rules of Court 2012 to summarily determine whether, inter alia, R2 had the power/authority to dispose of the charged shares to R3 on R1's behalf. The appellant also raised the question of whether R1 was time-barred from selling the charged shares as it failed to register the UK judgment in the Malaysian High Court within six years of the date of the judgment. Four months after the High Court dismissed encl 194, the matter proceeded to trial. Despite the trial judge issuing an 'unless order' that the appellant had to close its case if it failed to call all its witnesses to testify within the trial dates fixed for that purpose, TSM — who was the appellant's main witness — failed to testify. The appellant accordingly closed its case, whereupon the respondents submitted that they had no case to answer. Finding that the appellant had failed to prove its case, the trial court dismissed the suit. The instant appeals were against the dismissal of encl 194 and the dismissal of the suit.

Held, unanimously dismissing the appeals:

(1) The appellant's suit was rightly dismissed as it had failed to prove its case. encl 194 was a tactical manoeuvre and an abuse of process by the appellant to delay the proceedings after it failed to obtain an interim injunction against the respondents (see paras 72, 97 & 99).

(2) The trial judge was justified in enforcing the 'unless order' in the light of the appellant's/TSM's total disregard of the trial process. The appellant's main witness, TSM, failed to give good reasons to justify his absence. Even though the trial dates were fixed in advance, the appellant's witnesses made travel plans with no regard to the trial. The appellant was not able to substantiate the alleged medical grounds relied on by its witnesses for their absence at trial. The documents indicated that TSM had planned to travel abroad from August to November 2022 and had already scheduled an appointment with Dr Michael on 29 September 2022 even though he was aware of the trial dates for the second and third tranches of the trial. There was also no indication that the medical appointment was urgent or necessary. Such prior appointment was not disclosed to the Court or the respondents' solicitors until the day of trial. The trial judge had taken all these matters into consideration in enforcing the 'unless order' (see paras 52–54).

(3) Pursuant to a custodian agreement, R1 had authorised R2 to hold, deal with and administer the charged securities. As such, R2 at all material times had the requisite legal capacity to dispose of the charged shares to R3 at any time without giving notice in the event a breach or default of the facility agreement and/or the guarantee occurred. The sale of the charged shares to R3 was proper, valid and lawful (see para 58).

(4) The trial court rightly found that as an undischarged bankrupt, TSM had no legal capacity at the time to conclude any agreement on the appellant's

behalf with any party, including Abdullah Taleb, with respect to the alleged redemption of the charged shares by the appellant. The trial court, and subsequently the Court of Appeal, found, inter alia, that there was no 'Whatsapp Agreement' as alleged (see paras 69–70).

(5) The sale of the charged shares from R2 to R3 was concluded on a 'willing buyer-willing seller' basis pursuant to a direct business transaction in accordance with the Rules of Bursa Malaysia at 18 sen per share, which was within the acceptable volume weighted average price parameters set by Bursa Malaysia. The appellant did not call any expert witness to assert that 53 sen per share was the fair market price for the shares. The appellant had failed to discharge its burden of proof and, accordingly, no case of undervalue had been made out (see paras 74–75).

(6) R3 was a bona fide purchaser for value of the shares without notice of any impediment or competing claim to the title to the charged shares. R3 had fully paid R2 for the shares and was now the legally registered owner of the shares. The SSPA between R2 and R3 was legally binding, enforceable and valid. At all material times, R3 had acted in good faith and had conducted its own due diligence regarding the shares and obtained the requisite warranties from R2 to ensure that the purchase of the shares was lawful (see paras 78, 80 & 82).

(7) There was no evidence of any ruling from the Securities Commission ('SC') that R3 had contravened any provision of the Malaysian Code of Take-Overs and Mergers 2016 or the corresponding rules. Before a claim under s 357 of the CMSA could be filed, there must first be a ruling from the SC that there was a contravention of the relevant provision or regulations made under that Act. It was not the court's duty to usurp the functions, or to guess the decisions, of the SC. The trial judge correctly held that the appellant's claim founded on the provisions of the CMSA was unsustainable (see paras 86, 89 & 91).

(8) The appellant's contentions regarding R1's alleged delay in registering the UK judgment in Malaysia was misconceived as the issue was never the appellant's pleaded case nor did it form part of its cause of action against the respondents. R1 and R2 were merely exercising their rights to dispose of the charged shares pursuant to the share charge agreement and the charge supplement and not based on the UK judgment (see paras 92–94).

[Bahasa Malaysia summary

Perayu menggadaikan sahamnya dalam responden kelima ('R5') kepada responden pertama ('R1') untuk mendapatkan pemberian pinjaman USD83 juta ('kemudahan tersebut') daripadanya. Kemudahan itu juga dijamin dengan jaminan peribadi yang dilaksanakan oleh pemegang saham tunggal perayu, TSM, kepada R1. Apabila kedua-dua perayu dan TSM ingkar pembayaran

A semula jumlah yang perlu dibayar di bawah kemudahan tersebut, R1 memfailkan saman sivil terhadap mereka di London, mendapat penghakiman ingkar untuk jumlah terhutang ('penghakiman UK') dan mendaftarkannya di Mahkamah Tinggi di Kuala Lumpur untuk tujuan penguatkuasaan. R1 kemudian memfailkan prosiding untuk mengisytiharkan TSM bankrap dan kemudian mengambil langkah untuk menjual saham yang digadai dalam R5 kepada responden ketiga ('R3') pada 18 sen sesaham. Saham tersebut telah dijual oleh penama R1, responden kedua ('R2') kepada R3 menurut perjanjian jual beli saham ('SSPA'). R3 membayar penuh R1 untuk saham dan menjadi pemilik berdaftarnya. Lanjutan penjualan saham tersebut, perayu memfailkan tindakan terhadap semua responden dengan mendakwa bahawa: (a) ia tidak dimaklumkan mengenai penjualan saham tersebut; (b) saham tersebut telah dijual pada dibawah nilai kasar dan, oleh itu, responden pertama hingga keempat telah bertindak bersama-sama untuk mencederakan/merugikan perayu; (c) penjualan saham melanggar perjanjian yang TSM ada dengan seorang Abdullah Taleb (mewakili R1 dan R2) bahawa perayu akan dibenarkan untuk menebus saham dengan membayar USD54 juta dalam masa dua minggu dan apabila jumlah token dibayar serta-merta; (d) responden keempat ('R4') telah menggunakan maklumat orang dalam untuk membolehkan R3 memperoleh saham yang digadai pada nilai yang rendah dan dengan itu telah melanggar Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP') dan Kod Pengambilalihan dan Penggabungan Malaysia 2016; dan (e) R3 bukanlah pembeli saham bona fide yang digadai kerana ia mengetahui tentang dakwaan pelanggaran undang-undang R1, R2 dan R4. Dalam tindakan itu, perayu memohon untuk mengisytiharkan penjualan saham yang digadai kepada R3 terbatal dan tidak sah. Perayu memperoleh injunksi ex parte untuk menghalang kemuktamadan SSPA tetapi apabila ia diketepikan pada perbicaraan antara pihak, perayu memfailkan permohonan A 14A ('lampiran 194') di bawah Kaedah-Kaedah Mahkamah 2012 untuk menentukan secara ringkas sama ada, antara lain, R2 mempunyai kuasa/otoriti untuk melupuskan saham yang digadai kepada R3 bagi pihak R1. Perayu juga membangkitkan persoalan sama ada R1 dihalang had masa daripada menjual saham yang digadai kerana ia gagal mendaftarkan penghakiman UK di Mahkamah Tinggi Malaysia dalam tempoh enam tahun dari tarikh penghakiman. Empat bulan selepas Mahkamah Tinggi menolak lampiran 194, perkara tersebut diteruskan ke perbicaraan. Walaupun hakim perbicaraan mengeluarkan 'unless order' bahawa perayu terpaksa menutup kesnya jika ia gagal memanggil semua saksinya untuk memberi keterangan semasa tarikh perbicaraan yang ditetapkan untuk tujuan itu, TSM — yang merupakan saksi utama perayu — gagal memberi keterangan. Perayu dengan sewajarnya menutup kesnya, di mana responden berhujah bahawa mereka tidak mempunyai kes untuk dijawab. Mendapati perayu gagal membuktikan kesnya, mahkamah perbicaraan menolak saman itu. Rayuan semasa adalah terhadap penolakan lampiran 194 dan penolakan saman itu.

Diputuskan, sebulat suara menolak rayuan:

(1) Saman perayu telah ditolak dengan betul kerana ia gagal membuktikan kesnya. Lampiran 194 adalah gerakan taktikal dan penyalahgunaan proses oleh perayu untuk menangguhkan prosiding selepas ia gagal mendapatkan injunksi interim terhadap responden (lihat perenggan 72, 97 & 99).

(2) Hakim perbicaraan adalah wajar dalam menguatkuasakan 'unless order' memandangkan perayu/TSM sepenuhnya tidak mengambil kira proses perbicaraan. Saksi utama perayu, TSM, gagal memberikan alasan yang kukuh untuk mewajarkan ketidakhadirannya. Walaupun tarikh perbicaraan telah ditetapkan lebih awal, saksi perayu membuat rancangan perjalanan tanpa mengambil kira perbicaraan. Perayu tidak dapat membuktikan alasan perubatan yang didakwa digunakan oleh saksinya untuk ketidakhadiran mereka di perbicaraan. Dokumen tersebut menunjukkan bahawa TSM telah merancang untuk melancong ke luar negara dari Ogos hingga November 2022 dan telah pun menjadualkan temu janji dengan Dr Michael pada 29 September 2022 walaupun beliau mengetahui tarikh perbicaraan untuk peringkat kedua dan ketiga perbicaraan. Juga tiada tanda-tanda bahawa temujanji perubatan adalah segera atau perlu. Temu jadi terdahulu tersebut tidak didedahkan kepada mahkamah atau peguamcara responden sehingga hari perbicaraan. Hakim perbicaraan telah mengambil kira semua perkara ini dalam menguatkuasakan 'unless order' (lihat perenggan 52–54).

(3) Menurut perjanjian kastodian, R1 telah memberi kuasa kepada R2 untuk mengendalikan, berurusan dengan dan mentadbir sekuriti yang digadai. Oleh itu, R2 pada setiap masa material mempunyai kapasiti undang-undang yang diperlukan untuk melupuskan saham yang digadai kepada R3 pada bila-bila masa tanpa memberitahu sekiranya berlaku pelanggaran atau mematuhi perjanjian kemudahan dan/atau jaminan itu. Penjualan saham yang digadai kepada R3 adalah wajar, sah dan berdasarkan undang-undang (lihat perenggan 58).

(4) Mahkamah perbicaraan mendapati bahawa sebagai bankrap yang belum dilepaskan, TSM tidak mempunyai kapasiti undang-undang pada masa itu untuk membuat sebarang perjanjian bagi pihak perayu dengan mana-mana pihak, termasuk Abdullah Taleb, berkenaan dengan dakwaan penebusan saham yang digadai oleh perayu. Mahkamah perbicaraan, dan seterusnya Mahkamah Rayuan, mendapati, antara lain, bahawa tiada 'Perjanjian Whatsapp' seperti yang didakwa (lihat perenggan 69–70).

(5) Penjualan saham-saham yang digadai dari R2 hingga R3 telah dimuktamadkan atas dasar 'willing buyer-willing seller' menurut urus

niaga perniagaan langsung mengikut Peraturan Bursa Malaysia pada 18 sen sesaham, yang berada dalam lingkungan yang boleh diterima Harga Purata Jumlah Wajaran yang ditetapkan oleh Bursa Malaysia. Perayu tidak memanggil mana-mana saksi pakar untuk menegaskan bahawa 53 sen sesaham adalah harga pasaran yang adil bagi saham tersebut. Perayu telah gagal untuk melepaskan beban pembuktiannya dan, oleh itu, tiada kes dibawah nilai telah dibuat (lihat perenggan 74–75).

(6) R3 adalah pembeli bona fide untuk nilai saham tanpa notis apa-apa halangan atau tuntutan bersaing ke atas hak milik saham yang digadai. R3 telah membayar penuh R2 untuk saham tersebut dan kini menjadi pemilik saham yang berdaftar secara sah. SSPA antara R2 dan R3 adalah mengikat secara sah, boleh dikuatkuasakan dan sah. Pada setiap masa material, R3 telah bertindak dengan suci hati dan telah menjalankan usaha wajarnya sendiri berkenaan saham dan memperoleh waranti yang diperlukan daripada R2 untuk memastikan pembelian saham tersebut adalah sah (lihat perenggan 78, 80 & 82).

(7) Tiada keterangan sebarang ketetapan daripada Suruhanjaya Sekuriti ('SS') bahawa R3 telah melanggar mana-mana peruntukan Kod Pengambilalihan dan Penggabungan Malaysia 2016 atau peraturan yang sepadan. Sebelum tuntutan di bawah s 357 APMP boleh difailkan, terlebih dahulu mesti ada ketetapan daripada SS bahawa terdapat pelanggaran peruntukan atau peraturan berkaitan yang dibuat di bawah Akta tersebut. Bukan tugas Mahkamah untuk merampas fungsi, atau meneka keputusan, SS. Hakim perbicaraan dengan betul memutuskan bahawa tuntutan perayu yang diasaskan pada peruntukan APMP adalah tidak dapat dipertahankan (lihat perenggan 86, 89 & 91).

(8) Pertikaian perayu berhubung dakwaan kelewatan R1 dalam mendaftarkan penghakiman UK di Malaysia adalah salah arah kerana isu itu tidak pernah menjadi kes yang diplidkan perayu dan tidak menjadi sebahagian daripada kausa tindakannya terhadap responden. R1 dan R2 hanya menggunakan hak mereka untuk melupuskan saham yang digadai menurut Perjanjian Gadaian Saham dan Tambahan Gadaian dan bukan berdasarkan penghakiman UK (lihat perenggan 92–94).

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Dr Yang Xin Ha & Anor v Dato' Dr Nellie Tan Swee Lain & Ors [2018] MLJU 1180, HC (refd)

Joseph Paulus Lantip v Tnio Chee Chang and another appeal [2020] 5 MLJ 708; [2020] 4 CLJ 79, CA (refd)

Lai Soon Onn v Chew Fei Meng and other appeals [2019] 2 MLJ 96, CA (refd)

Roziah binti Ismail v Johany bin Jaafar & Ors [2018] MLJU 805, HC (refd)

Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)
Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1, FC (refd)
Shahidan bin Shafie v Atlan Holdings Sdn Bhd & Anor [2015] MLJU 1944, CA (refd)
Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609, FC (refd)
Syed Abu Bakar bin Ahmad v PP [1984] 2 MLJ 19, FC (refd)
U Television Sdn Bhd & Anor v Comintel Sdn Bhd [2017] 5 MLJ 292, FC (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 188, 217, 317A, 357, 360
Evidence Act 1950 s 101
Reciprocal Enforcement of Judgment Act 1958
Rules of Court 2012 O 14A, O 33 r 2, O 45

Appeal from: *Empire Holdings Ltd v Ithmaar Development Company Ltd & Ors* [2023] MLJU 651 (High Court, Kuala Lumpur)

So Chien Hao (with Nabilah Mat Sam) (Zailan & Co) for the appellant.
Sathya Kumardas (with Koo Yin Soon and Mohammed Yin Soon Daud Sulaiman) (Shearn Delamore & Co) for the respondents.

Azmi Ariffin JCA:

INTRODUCTION

[1] There are two separate notices of appeal filed before this honourable court for us to decide. They are as follows:

(a) COA: W-02(IM)(NCC)-441–03 of 2022; and

(b) HC: WA-22NCC-295–07 of 2021

Appeal against the decision of the High Court delivered on 18 February 2022 dismissing the appellant's application dated 27 December 2021 in encl 194 (Suit 295), for summary disposal pursuant to O 14A and/or O 33 r 2 of the Rules of Court 2012 with costs of RM30,000 to be paid to the first respondent (with second respondent), third respondent and fourth respondent respectively.

(a) COA: W02(NCC)(W)-511–03 of 2023; and

(b) HC: WA-22NCC-295–07 of 2021

Appeal against the decision of the High Court delivered on 24 March 2023 dismissing the appellant's claim (after full trial) in encl 1 with costs of RM80,000 to be paid to first respondent (with second respondent), third

A respondent and fourth respondent respectively.

[2] To facilitate the determination of these two appeals, we find it more convenient to combine and decide both the appeals in a single judgment as they are interrelated.

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[3] For ease of reference, the parties will be referred to as plaintiff and first, second, third, fourth and fifth defendants as they were in the High Court.

C CHRONOLOGY OF EVENTS

[4] We shall now briefly lay out the background facts leading to the filing of the claim.

D **[5]** The plaintiff is a foreign company incorporated in the Republic of Seychelles, having its registered address at Abacus (Seychelles) Ltd, Mont Fleuri, Mahe, Seychelles and carries on the business of investment holdings and land development.

E **[6]** The plaintiff previously held 66.67% of the ordinary shares in fifth defendant, a public listed company.

[7] On or about 20 April 2008, the plaintiff and the first defendant entered into a *Murabaha* facility agreement whereby a loan of USD83m was granted by the first defendant to the plaintiff.

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[8] The other party to the facility agreement was Shamil Bank of Bahrain BSC, which merged with and formed Ithmaar Bank, now known as Ithmaar Bank BSC, the second defendant around 2016.

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[9] The loan facility was secured by:

(a) share charge dated 20 April 2008 and a charge supplement dated 28 October 2015 of the plaintiff's 64.99% shares or equivalent to 148,651,497 of the plaintiff's shares. The charge was in favour of the first defendant; and

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(b) a personal guarantee executed by Tan Sri Mohan Swami, the sole shareholder in plaintiff until June 2021.

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[10] The facility was to finance plaintiff's voluntary take-over offer of fifth defendant and Chase Perdana Bhd.

[11] The plaintiff and Tan Sri Mohan Swami, however failed to fully repay

the outstanding sums of USD99.96m owed to the first defendant under the facility agreement and or the guarantee as of 15 April 2009, and were in breach of the facility agreement, share charges and or the guarantee.

[12] As a result of the default, on 15 April 2010, the first defendant commenced a civil suit in London against the plaintiff and the guarantor for the outstanding sums due and owing under the facility agreement ('UK suit').

[13] On 5 June 2010, a settlement agreement was entered between first defendant, plaintiff and Tan Sri Mohan Swami whereby plaintiff and Tan Sri Mohan Swami acknowledged the outstanding sum of USD65,222,911.42 and USD16,075,949 and agreed to pay the same fully by 2010 with late payment, compensation charges and costs up to USD150,000. The settlement agreement also provides for judgment to be entered in the English Commercial Court ('UK judgment').

[14] On 7 June 2010 a default judgment was accordingly entered by first defendant in the English Commercial Court against the plaintiff and Tan Sri Mohan Swami for the sum of USD65,225,120.40 with judgment interest of 8%pa until date of full payment.

[15] Due to their failure to comply with the UK judgment, the first defendant had on 24 November 2010 registered the UK judgment at the High Court of Malaya at Kuala Lumpur.

[16] Unfortunately, plaintiff and Tan Sri Mohan Swami failed to pay the June/September 2010 instalments.

[17] Following the said breach of the settlement agreement and the UK judgment, the first defendant registered the UK judgment entered in at the High Court of Malaya at Kuala Lumpur ('KLHC judgment').

[18] Notwithstanding the entry of the UK judgment and the KLHC judgment, plaintiff and Tan Sri Mohan Swami still failed, refused and neglected to repay the outstanding sums.

[19] Consequently, on or about 2 March 2016, the first defendant commenced bankruptcy proceedings against Tan Sri Mohan Swami for the sum of USD59,137,636.38 at the High Court of Malaya of Shah Alam vide Bankruptcy No BA-29NCC-1835–03 of 2016.

[20] On 13 July 2017, Tan Sri Mohan Swami was adjudged and declared a bankrupt by the Shah Alam High Court.

[21] Tan Sri Mohan Swami remains an undischarged bankrupt.

[22] In order to realise the long owing outstanding debts, on 22 June 2021, the first defendant then exercised its rights under the share charges, to sell and dispose of the charged securities/charged assets, namely 132,151,497 of the plaintiff's shares equivalent to 57.78% of the total issued and paid-up ordinary share capital in fifth defendant to the third defendant at RM0.18 per share for the partial recovery of the outstanding sums owed by plaintiff and Tan Sri Mohan Swami.

[23] The fifth defendant's shares were sold by the second defendant to third defendant pursuant to a share sale and purchase agreement dated 22 June 2021.

[24] Full payment for the fifth defendant shares has been made by the third defendant to the first defendant and the third defendant is now the legally registered owner of the fifth defendant shares.

[25] As of 22 June 2021, the total amounts overdue and owing by plaintiff to first defendant under the UK judgment and or the facility agreement remained unpaid is approximately USD84,360,125.64.

THE PLAINTIFF'S CASE

[26] In the writ and statement of claim dated 21 July 2021, the plaintiff pleaded case against the defendants can be summarised as follows:

(a) that in breach of contract and or duty of care, first defendant and second defendant had sold the fifth defendant shares to third defendant without notice to the plaintiff;

(b) that the sale of the fifth defendant shares was in breach of contract by way of a 'representation not to sell shares' between Abdullah Taleb and Tan Sri Mohan Swami on 17 June 2021;

(c) that in breach of contract and or duty of care, first defendant and second defendant had sold the fifth defendant shares to third defendant at a gross undervalue;

(d) that the sale of the fifth defendant shares was in breach of an alleged agreement between Abdullah Taleb and Tan Sri Mohan Swami to allow plaintiff the redemption of the charged securities;

(e) that the fourth defendant had acted in conflict of interest and or in breach of his fiduciary duties and had utilised insider information for third defendant to acquire the fifth defendant shares at an undervalue, in breach of the Capital Market and Services Act 2007 under, inter alia, ss 188 and or 217 and or 317A of the Capital Market and Services Act

2007 and the Malaysian Code on Take-Overs and Mergers 2016;

(f) that by causing the sale of the fifth defendant shares to third defendant at a gross undervalue, first, second, third and/or fourth defendant have wrongfully and unlawfully acted in concert and/or conspired to injure the plaintiff by lawful and/or unlawful means and/or to oppress and or cause unfair prejudice to the plaintiff and the minority shareholders of fifth defendant by unlawful means; and

(g) that the third defendant is not a bona fide purchaser of the fifth defendant shares without notice of first defendant's, second defendant's and fourth defendant's breach of duty in law.

THE ACTION

[27] On 3 July 2021, plaintiff filed High Court Kuala Lumpur Suit No WA-22NCC-295–07 of 2021 (Suit 295), seeking declaratory and injunctive reliefs against the defendants, inter alia, to have the sale of shares (132,151,497) in fifth defendant by the second defendant (nominee of the first defendant) to the third defendant pursuant to a share sale agreement declared null, void, invalid and/or rescinded.

[28] The plaintiff avers that first, second, third and fourth defendant have wrongfully and unlawfully acted in concert and/or conspired to injure the plaintiff by lawful and/or unlawful means; and/or to oppress and/or cause unfair prejudice to plaintiff and the minority shareholders of fifth defendant by unlawful means.

PRE-TRIAL HISTORY

[29] On 27 September 2021, the plaintiff also files a notice of application for an injunction against the defendants to, inter alia, restrain completion of the 22 June 2021 share sale and purchase agreement.

[30] On 7 July 2021, an ex parte injunction was granted in favour of the plaintiff. Nevertheless, the ex parte injunction was set aside upon the court hearing the application inter parte and awarded costs and damages in favour of the defendants on 27 September 2021.

[31] Aggrieved with the decision, on 1 December 2021, the plaintiff filed an appeal to the Court of Appeal against the said decision vide Civil Appeal No W-02(IM)(NCC)-1827–09 of 2021. The Court of Appeal after hearing the party's submission dismissed plaintiff's appeal with costs.

A QUESTIONS OF LAW

[32] On 27 December 2021, plaintiff, filed an O 14A application for the first time, to challenge the second defendant's power/right/authority to enforce the share charge without a full trial of the plaintiff's case. The proposed legal questions of law to be determined prior to the trial in encl 194 are as follows:

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Question 1

Whether in law, the 2nd Defendant who is not the charge, has the legal capacity to rely on the charge dated 20.4.2008 and the supplementary charge dated 28.10.2015, both of which were created by the Plaintiff to the 1st Defendant ("Charge") and/or enforce the charges by selling the charged shares to the 3rd Defendant?

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Question 2

D

Whether in law, due to the failure of the 1st Defendant to register the judgment obtained by the 1st Defendant in the United Kingdom against the Plaintiff ("UK Judgment") under section 4 of the Reciprocal Enforcement of Judgment Act 1958 has relinquished the 1st Defendant's right to enforce the charge?

Question 3

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Whether the failure on the 1st Defendant to enforce the charge since 2010, prohibits the 1st Defendant to enforce the charge in 2021?

Question 4

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(d) Whether in law, the 1st Defendant was time-barred for failing to register the UK Judgment within a period of 6 years from the date of obtaining the UK Judgment?

[33] On 29 December 2021, plaintiff filed a second notice of application for injunction against the defendants until the disposal of the O 14A application.

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[34] On 18 February 2022, the learned judicial commissioner dismissed both the O 14A application and the notice of application for injunction with costs. The plaintiff has filed an appeal against the decision of the O 14A application.

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TRIAL HISTORY

[35] On 15 June 2022 and 16 June 2022, the trial begins with plaintiff calling five witnesses save for Tan Sri Mohan Swami and Sarin Swami (medical certificate produced on the morning of 15 June 2022 alluding to Tan Sri Mohan Swami having self-admitted at the hospital for back pain on 14 June 2023), the learned judicial commissioner fixed 28–30 September ('second tranche') and 28–30 November 2023 ('third tranche') for continued trial.

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[36] The learned judicial commissioner also gives directions that the plaintiff is to have all their witnesses ready at the next date with an *unless order* that in the event the plaintiff fails to produce all their witnesses, the plaintiff is to close their case.

[37] On 28 September 2022, second tranche of the trial commences. The plaintiff's witness (the valuer, Nagalingam) and Sarin Swami give evidence. At about 5pm, the plaintiff's solicitor informs the court and parties, that Tan Sri Mohan Swami is in London and provides 'supporting documents' on this and seeks that the 29th and 30th be vacated and Tan Sri Mohan Swami be allowed to give evidence at the third tranche of trial in November 2022.

[38] Solicitors for the first, second, third and fourth defendant objected to the above request and the learned judicial commissioner then invited the plaintiff to have any other witness to give evidence in place of Tan Sri Mohan Swami on 29 September 2022 or 30 September 2022 or to produce Tan Sri Mohan Swami.

[39] Following the plaintiff's solicitor's declining the court's invitation, this court gives effect to the 16 June 2022 unless order effect and directs that plaintiff's case be closed.

APPLICATION TO STAY TRIAL PENDING THE DISPOSAL OF THE O 14A APPEAL AND TO REOPEN THE PLAINTIFF'S CASE

[40] On 17 November 2022, the plaintiff filed encl 333, applying to stay the trial pending the disposal of the O 14A appeal and to reopen plaintiff's case.

[41] On 29 November 2022, the learned judicial commissioner after hearing the submission of plaintiff's counsel, dismissed encl 333 with costs.

THE DEFENDANTS' CASE

[42] The defendants case may be summarised as follows:

(a) no breach of contract in the sale of the fifth defendant shares;

(b) no legal duty to give any prior notice to the plaintiff of the sale of the said shares;

(c) the sale of the shares was not grossly undervalued;

(d) no evidence presented by the plaintiff on the alleged representation between Abdullah Taleb and Tan Sri Mohan on the agreed;

(e) redemption of the charged securities including the fifth defendant shares;

(f) the third defendant purchase of the fifth defendant shares was lawful and in accordance with the rules of Bursa Malaysia; and

(g) the third defendant takeover offer of then remaining shareholders of fifth defendant is in accordance with the CMSA and the Take-Overs and Mergers Code.

[43] On 29 November 2022, the third tranche of trial commences.

[44] Tan Sri Mohan Swami did not appear on the third tranche dates and plaintiff chose to close its case without calling any witness.

[45] Subsequently, all the defendants took a common position and make a submission of no case to answer and made the elections not to produce evidence or witnesses.

[46] Pursuant to a consent order dated 18 April 2024 (encl 34), the plaintiff has withdrawn its appeal against the third, fourth and fifth defendants without liberty to file afresh and without order as to costs. Hence, this appeal is strictly limited to against the first and second defendants.

HIGH COURT FINDINGS FOR APPEAL 441 AND APPEAL 511

[47] The findings for both the appeal were well laid out by the learned trial judge in his grounds of judgment where he concluded, inter alia, as follows:

> Appeal 441 (Question of Law)
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> [17] After reading the parties respective written submissions and hearing the counsel's oral submission, I have no hesitation in dismissing the plaintiff's application on the following grounds:
>
> (1) learned counsel for the plaintiff has conceded during oral submissions that there are other issues that needed to be determined by the court at the trial apart from the four questions. This means that even if the four questions are not determined in favour of the plaintiff, the matter will still have to proceed to trial to determine the other remaining issues that have been pleaded;
>
> (2) at the time encl 194 is fixed for hearing on 18 February 2022, the trial for the suit is a less than four months away. Even if an order is granted for the four questions to be determined, with the exchanges of affidavits and time given to file parties' respective written submissions and reply submissions, the hearing of encl 194 can optimistically be fixed only sometime in late April or May 2022. This is just less than 6 weeks from the actual trial itself. There is no significant saving of time and costs, more so when there are other issues that needed to be determined at the trial as stated above;
>
> (3) further, at least in relation to question 1 which is conceivably

determinative of the suit, this is not even an issue that is pleaded in the plaintiff's statement of claim. Learned counsel for the plaintiff sought to argue that the plaintiff did raise this issue in its reply to the defence. The learned HCJ observed that the plaintiff's cause of action is contained and determined from its statement of claim and not its reply;

(4) the plaintiff is also estopped from changing its position taken at the hearing of the application for the ex parte and inter parte injunction when the then learned counsel for the plaintiff had conceded that the plaintiff is not challenging the second defendanfs legal right to sell the Turiya shares. The position taken throughout was that the sale was made at a price that is not a fair value for the Turiya shares which according to the plaintiff formed a controlling block. It is too late for the plaintiff to now change its position.

Appeal 511 (The plaintiff's case after full trial)

[72] With the aforesaid principles on the submission of no case to answer and the burden of proof in mind, I will now consider the various legal issues raised.

Duty to give reasonable notice of intended sale

[73] It is contended that there was a duty owed by IDC and Ithmaar Bank to 'give reasonable notice of any intended sale …' prior to the sale of the charged securities, that the omission to do so amounted to a breach of the contract by IDC and Ithmaar Bank to EHL.

[74] With respect, this contention contradicts the express terms of the security documents executed by EHL itself which provide that IDC and or Ithmaar Bank are entitled to enforce the securities without the requirement for notice to EHL.

[75] More specifically, cl 8.2 of the share charges clearly provides that IDC and or Ithmaar Bank, at any time after the security created by the share charges shall have become enforceable, shall have power either in its own name or in the name of EHL and without notice to EHL or any other person.

[76] Accordingly, as there is no obligation or duty on IDC and or Ithmaar Bank to give notice to EHL prior to sale of the Turiya shares, it naturally follows that there is no breach of contract for IDC and or Ithmaar Bank in proceeding with the sale without notifying EHL beforehand.

[77] Indeed, EHL has not been able to point to any provisions of the facility documents in support of its claim.

Breach of representation not to sell

[78] … EHL claimed that IDC and or Ithmaar Bank had agreed to EHL's redemption of the charged securities including the Turiya shares by a payment of USD54m within two weeks upon a token amount being paid immediately.

[79] However, there is no evidence adduced either in respect of the representation said to have passed between Abdullah Taleb and TSM between 16 July 2021 and 17 June 2021 (the alleged representation) as averred to in the pleadings or to

support the alleged agreement between Abdullah Taleb and TSM on or about 23 June 2021 (the alleged agreement).

[80] ... TSM had failed to attend at the trial on the scheduled dates to adduce evidence in respect of such exchanges and accordingly in the absence of any oral or documentary evidence to support the alleged representation or the alleged agreement, such assertions have not been established by EHL.

[81] ... TSM was at the material times an undischarged bankrupt which means that unless authorised by the Director General of Insolvency, he was not in a position to represent EHL in any negotiations at all.

[83] The evidence of Sarin Swami confirms that there are no minutes of meeting or any resolutions on the transmission of such powers and in any event that TSM was not an officer but only a shareholder of EHL.

Turiya shares sold at an undervalue

[92] ... There is a distinction between what is considered to be the 'market value' and the net asset value stated in Turiya's financial reports. The former only requires reference to the closing market price on the day. However, the valuation issue made by EHL extends beyond mere 'market value' and requires the determination of what is the 'fair market value' for the Turiya shares taking into account the fact that they constitute a controlling stake in Turiya and that the transaction was a foreclosure sale. Such valuation involves technical issues which the court would require experts' assistance to make an informed decision.

[97] To my mind the valuation of a premium in a 'controlling stake' of a listed company fall beyond the 'range of common experience or common knowledge' and this requires 'specialist knowledge' from the relevant expert. More so when one also takes into consideration the fact that the shares were transacted in the circumstance of a foreclosure.

[100] ... In this case, there is no expert evidence proffered by the plaintiff with regard to the valuation of the Turiya shares. Instead, the only expert evidence before the court was in the form of EHL's valuer's testimony over the valuation of Wisma Chase Perdana Building.

Evidence of PW1

[106] ... EHL did not tender any evidence in the form of a written report signed by an expert on the valuation of shares of a company quoted and listed on Bursa Malaysia and did not exhibit such written report in an affidavit sworn or affirmed by such an expert.

[107] As such, it is the judgment of this court that the evidence of PW1 and the valuation reports are irrelevant to the question of the fair market value of the Turiya shares.

[118] The sale of the Turiya shares by Ithmaar Bank to MAA was on a willing buyer-willing seller basis on the terms of the share sale agreement and in accordance with rule 10.09(2) (Mode of Direct Business Transaction) of the Rules of Bursa Malaysia Securities Bhd.

[119] The shares of Turiya, which includes Turiya shares, are listed and quoted on Bursa Malaysia.

[121] The sale of the Turiya shares by Ithmaar Bank to MAA is therefore valid, proper and stands concluded pursuant to a direct business transaction in accordance with the rules of Bursa Malaysia at the price of RM0.18 each, which is within the acceptable VWAP parameters set by Bursa Malaysia.

[149] Without any expert witness testifying that the net asset value of RM0.53 in fact represents the fair market price for the Turiya shares, in the light of the facts alluded to above, there is simply no basis for this court to conclude that the sale price of RM0.18 per Turiya Shares in the present case, transaction on a force sale basis, is grossly undervalue as contended by EHL.

[191] EHL claimed that the acquisition of the Turiya shares by MAA under the shares sale agreement at the price of RM0.18 per Turiya shares is not a premium above the market value and therefore is a contravention of the Take-Overs and Mergers Code and s 217 of the CMSA.

[193] However, there is no evidence of any ruling from the Securities Commission that MAA has contravened or breached any provision of the Malaysian Code on Take-Overs & Mergers 2016 or the corresponding rules.

[198] During examination in chief of PW2, PW2 gave evidence that the Securities Commission vide letter dated 1 June 2022 to Turiya had informed Turiya that Securities Commission have concluded their investigation of the plaintiff's complaint in their letter dated 28 January 2022 and 15 February 2022 and Securities Commission had made a finding that EHL complaint to be unsubstantiated and that there is no evidence to support the alleged contravention of the securities laws and listing requirements.

OUR DECISIONS

Submission of no case to answer

[48] It is trite that the effect of a submission of no case to answer invites the court to hold that plaintiff's case falls within either one of the two categories which leaves the defendants with no case to answer. The categories are:

(a) no case has been established in law by the plaintiff's ('first limb'); and

(b) the burden of proof has not been discharged ('second limb').

[49] The burden of proof lies on the plaintiff throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof (see s 101 of the Evidence Act 1950).

[50] In the case of *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609, the Federal Court speaking through

Ramly Ali FCJ (as he then was) held as follows:

> Whether the plaintiff has met the burden of proof where the defendant elected not to call any witnesses.
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> [56] Learned counsel for the plaintiff argued that the Court of Appeal ought not to disturb findings of fact by the High Court ...
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> It was further submitted that the evidence led by the plaintiff must be assumed to be true when the defendant elected not to call any witnesses. On these submissions we have two observations to make. The first is that the principle on which an appellate court could interfere with findings of fact by the trial court is the plainly wrong test (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 and *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785*).*
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> And the second is that the burden of proof at all times is of course borne by the plaintiff to establish on the balance of probability the existence of a legally enforceable settlement agreement (see *Ranbaxy (Malaysia) Sdn Bhd v E I Du Pont De Nemours & Co* [2011] MLJU 1135; [2011] 1 AMCR 857). In other words, it was upon the plaintiff itself, and certainly not the defendant, to discharge the burden of showing the settlement agreement had come into existence. It is for the plaintiff to prove its case and satisfy the court that its claim is well-founded before the court grants judgment on the claim (see *The Fordeco Nos 12 and 17; the owners of and all other persons interested in the Ships Fordeco No 12 and Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, the owners of the Ship Mv Xin Hua 10* [2000] 1 MLJ 449, *Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and other appeals* [2004] 4 MLJ 105 and *Teh Swee Lip v Jademall Holdings Sdn Bhd* [2013] 6 MLJ 32).
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> It is true that in the present case the defendant elected not to call any witnesses. However, it is imperative to bear in mind that from the outset the legal burden of the existence of the settlement agreement was with the plaintiff as the claimant in the present action. By reasons of the legal principles, then fact that the defendant led no evidence or call no witnesses did not absolve the plaintiff from discharging its burden in law. In this regard, in adopting the approach of the case of *Storey v Storey* [1961] P 63*, Suriyadi JCA (as His Lordship then was) in Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369 recognised this to be the case as can be seen from the following passage of His Lordship's judgment:
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> > There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.
>
> [57] We therefore agree with the submission of learned counsel for the defendant to the effect that despite the fact the defendant did not call any witness and that even if the plaintiff's evidence is unopposed (and therefore presumed to be true), this does not automatically equate to that evidence satisfying the burden of proving the existence of the settlement agreement borne by the plaintiff, or mean that the burden of proving on the balance of probabilities no longer applies, or that a case to

answer is automatically made out. The evidence adduced by the plaintiff must still be sufficient to prove the existence of the settlement agreement. This crucial point was overlooked by the learned High Court judge. On the factual matrix of the case, it is patently clear that the plaintiff has not discharged the burden. On this basis, the Court of Appeal was in every respect justified in holding that the learned High Court judge was plainly wrong in making a ruling of law that the settlement agreement had come into existence based on the conduct of both parties. Indeed, the election by the defendant to call no evidence at trial does not preclude the reversal of a plainly wrong findings of the learned High Court judge by the Court of Appeal.

[51] With the aforesaid principles on the submission of no case to answer and the burden of proof in mind, we will now consider the various legal issues raised.

Whether the unless order was wrongly enforced

[52] The plaintiff contended that the unless order was wrongly enforced because the learned judicial commissioner refused to adjourned the trial to allow further subpoena witnesses.

[53] We are of the view that despite hearing six witnesses over two tranches of trial in the KL High Court over the period of four days on 15 June 2022, 16 June 2022, 28 September 2022 and 29 November 2022, plaintiff main witness, one Tan Sri Mohan Swamy failed to make an appearance despite the issuance of an unless order and the plaintiff was ordered to close its case at the end of the second tranche of trial. The first and second defendants then submitted no case to answer and made the elections not to produce evidence or witnesses.

[54] The learned judicial commissioner's decision in this regard is justified in light of plaintiff/Tan Sri Mohan Swamy total disregard of the trial process and failure to give good reasons to justify the witness's absence. The surrounding circumstances of the case clearly showed that:

(a) even though the trial dates have been fixed in advanced, the plaintiff's witnesses repeatedly made travel to plans with no regard to the trial;

(b) the plaintiff was not able to substantiate the alleged medical grounds relied on by its witnesses, where the excuse in the first tranche of trial was not accepted by the learned judicial commissioner and subsequently the plaintiff's witness' documents showed travel arrangements being made to clash with the court dates;

(c) the supporting documents produced by the plaintiff's solicitors confirmed that Tan Sri Mohan Swamy's application to the insolvency

office before June 2022, prior to the first tranche of the trial. These documents indicated that Tan Sri Mohan Swamy had planned to travel abroad from August to November 2022 and had already scheduled an appointment with Dr Michael on 29 September 2022. At this time, Tan Sri Mohan Swamy was aware of the trial dates for the second and third tranches of the trial;

(d) there was no indication that the medical appointment was urgent or necessary; and

(e) such prior appointment was not disclosed to the court nor the defendants' solicitors until the day of trial. In our view, the learned judicial commissioner has taken into all consideration the absence of Tan Sri Mohan Swamy in the trial and has not erred in his finding on the unless order.

Whether the second defendant who is not the chargee has the legal capacity to enforce the charged assets by selling the fifth defendant shares to the third defendant

[55] On or around 1 June 2008 the first defendant and Shamil Bank of Bahrain entered into a custodian agreement where Shamil Bank of Bahrain would hold and administer on behalf of the first defendant the charged securities.

[56] Concurrent with the custodian agreement, Shamil Bank of Bahrain had also appointed Maybank Custody Services as its custodian bank, in which a custody agreement was entered between Shamil Bank of Bahrain and Maybank on 29 June 2008.

[57] Shamil Bank of Bahrain had subsequently transferred all its rights and liabilities under the facility, the Shamil Bank custodian agreement and the Maybank custodian agreement to the second defendant.

[58] The custodian agreement dated 1 June 2008 was executed between the first and second defendant wherein the second defendant is authorised by the first defendant to hold, deal and administer the said charged. As such, the second defendant was at all times clocked with the requisite legal capacity to dispose of the fifth defendant shares to third defendant under the facility (as governed by, inter alia, the facility agreement and share charge agreement) at any time without notice in the event of breach and/or default of, inter alia, the facility agreement and/or the guarantee, which includes the failure by the plaintiff to pay the outstanding sums owed to the first defendant under or in connection with the facility agreement. Hence, such sale of the shares to third defendant is proper, valid and lawful.

[59] The multiple issues pleaded by plaintiff against all the defendants relate to unlawful use of insider information by the fourth defendant, conspiracy to defraud, inducement of breach of contract, breach of ss 188 and 217 of the Capital Markets and Services Act 2007 and the Take-Over and Merger Code 2016. With respect, these causes of action are all targeted at the 'undervalue' sale price for the fifth defendant shares and has nothing to do with the first and second defendant right to sell the fifth defendant shares

[60] In addition, the plaintiff's pleaded case is limited to an alleged undervalued sale of the fifth defendant shares. It is a cardinal rule that parties are bound by their pleadings and are not allowed to adduce facts, issues and submissions on matters which they had not pleaded. Courts have repeatedly held that a decision based on an issue that was not raised by the parties in their pleadings is liable to be set aside.

[61] In the case of *Joseph Paulus Lantip v Tnio Chee Chang and another appeal* [2020] 5 MLJ 708; [2020] 4 CLJ 79, where the Court of Appeal through the judgment delivered by Mary Lim JCA (as she then was) held as follows:

> [28] The role played by pleadings cannot be overstated. It is a fundamental principle of fair play which extends to the court that all parties are bound by their pleadings. It would be most damaging to our administration and system of justice if parties are allowed to plead a certain complaint, lead evidence on another and the court decides on something entirely different. The Federal Court recently reminded and expressed the following view on the importance pf proper pleadings in *Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292; [2018] 1 CLJ 415:
>
> [29] It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: *Samuel Naik Siang Ting v Public Bank ... In Lee Ah Chor v Southern Bank Bhd* [2015] 6 MLJ 1; [1991] 1 CLJ 667; [1991] 1 CLJ Rep 239 it was held that where a vital issue was not raised in the pleadings, it could not be allowed to be granted and to succeed on appeal. A decision based on an issue which was not raised bv the parties in their pleadings is liable to be set aside: ... In *The Chartered Bank v Yong Chan* [1990] 1 MLJ 157; [1990] 1 CLJ 1113; [1990] 1 CLJ Rep 330, the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case, the trial judge erred in concluding that the pleadings included a claim for breach of contract as well as a claim for libel.

[62] In the case of *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1 the Federal Court held:

> (1) Parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded. Where a vital issue is not raised in the pleadings it cannot be allowed to be argued and to succeed on appeal (see para 29); *State*

Government of Perak v Muniandy [1986] 1 MLJ 490*; Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313*; Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428*; and The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 referred.

[63] Moreover, the second defendant's right and entitlement to sell the fifth defendant shares had already been decided at the inter partes hearing of the plaintiff's application for interim injunction (encl 2 in Suit 295) with such findings affirmed by the Court of Appeal following the dismissal of plaintiff's interim injunction appeal.

[64] It was even conceded by the plaintiff's counsel that the first and second defendant had a right to sell the fifth defendant shares and that the only issue is whether the sale of the fifth defendant shares was sold at an undervalue. To us the matter is thus *res judicata* and cannot be re-litigated by way of encl 194.

[65] In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, the Supreme Court through the judgment delivered by Peh Swee Chin FCJ (as he then was) said as follows:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there shoul d be finality in litigation-interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.

[66] In *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1, the Federal Court through the judgment delivered by Abdull Hamid Embong FCJ (as he then was) said as follows:

> [44] We conclude by saying that once a regularly obtained order or judgment had been perfected, the court was functus officio. The matter, as decided vide encl 6, was thus res judicata and could not be re-litigated. The order made under encl 6 was appealed and affirmed right up to the Federal Court. It could not now be revisited or re-assetted under any guise in a subsequent proceeding. The issues raised by the respondent in encl 29 could have been brought up during the appeal process. The law does not allow the respondent to have a second bite of the cherry and in the manner as it did.

[67] Furthermore, the plaintiff did not even apply for leave to the Federal Court against the Court of Appeal Order dated 1 December 2021. Therefore,

the plaintiff has waived its rights to raise issues on the sale of the fifth defendant shares. Given this, the plaintiff is precluded from now revisiting this matter. Hence, we find no merit in this allegation.

Whether there was an alleged agreement via WhatsApp entered into between Tan Sri Mohan Swami and Abdullah Taleb on the redemption of the fifth shares

[68] The learned counsel for the plaintiff contended that there was an alleged agreement via WhatsApp entered into between Tan Sri Mohan Swami for and on behalf of the plaintiff, and Abdullah Taleb, for and on behalf of the first and/or second defendant, whereby the first and/or second defendant agree to the redemption of the fifth defendant shares and the other charged securities, by payment of USD54m within two weeks, and upon a token amount being paid immediately.

[69] In this connection, the learned judicial commissioner at para 81 of his judgment, had this to say:

> [81] Furthermore, TSM was at the material times an undischarged bankrupt which means that unless authorised by the Director General of Insolvency, he was in not in a position to represent EHL in any negotiations at all. In this regard, I have in my previous judgment in respect of the injunction proceedings addressed this point where I held thus:
>
> > [57] ... I must address the common contention by learned counsel for the defendants regarding TSM's capacity to negotiate with the first defendant. TSM is an undischarged bankrupt and it is not disputed that TSM was not authorized by the Director General of Insolvency under s 38(1)(d) and 139 of the Insolvency Act '... to directly and indirectly taking part in the management of any company'.
> >
> > [58] Therefore, based on the authorities above and s 38(1) of the Insolvency Act 1967, TSM, as an undischarged bankrupt, is incompetent and has no legal capacity to enter into any arrangement, contract or agreement on behalf of the plaintiff with Abdulla Taleb and/or the first defendant and the second defendant.
> >
> > [59] Whilst I accept that the first defendant was fully aware of TSM's status as a bankrupt, nevertheless, TSM had no capacity in law to negotiate and to conclude any agreement between the plaintiff and the first defendant. This was the reason why Abdulla Taleb had requested TSM to procure the plaintiff's solicitors to write to the first defendant with the plaintiff's proposal for settlement. This was what led to the letter dated 26 June 2021 from the plaintiff's solicitors to the first defendant.
> >
> > [60] The contents of the letter however referred expressly to the Whatsapp messages as basis for a 'concluded agreement'. This means that the plaintiff had relied upon TSM to conclude the contract on its behalf. But this is precisely what TSM could not do as an undischarged bankrupt — to negotiate and conclude a contract on his own and/or on behalf of another. On this ground alone, the

plaintiff's reliance on the existence of the 'agreement' must fail'.

[70] To recap, the High Court and subsequently the Court of Appeal found, inter alia, that there was no such 'WhatsApp Agreement', and therefore, no serious question to be tried, and that in any event damages would be an adequate remedy.

[71] The only issue in the High Court proceedings was whether the shares sale was at an undervalue.

[72] In our view encl 194 is merely a tactical manoeuvre by the plaintiff to delay the proceedings and an abuse of process after having been unsuccessful in obtaining interim injunctive relief.

Whether the sale of the fifth defendant shares which was sold by the first and second defendant via a share sale agreement at RM0.18 per share, was at an undervalue

[73] The plaintiff contended that the first defendant did not take reasonable care to sell the fifth defendant shares at a true, fair and market value. There was no evidence before the court that prior to the sale of the charged shares, either the first second and/or third defendant carried out any valuation to value the shares. The plaintiff also alleged that the market value of the fifth defendant shares ought to be RM0.53 per share as at December 2020 and not RM0.18 per share.

[74] With the greatest respect, we disagree with the plaintiff's contention. The sale of the fifth defendant shares from the second defendant to the third defendant, was concluded on a willing buyer willing seller basis pursuant to a direct business transaction in accordance with the Rules of Bursa Malaysia, at the price of RM0.18 each per share, which is within the acceptable volume weighted average price parameters set by Bursa Malaysia.

[75] The plaintiff did not call any expert witness to determine that the net asset value of RM0.53 in fact represents the fair market price for the fifth defendant shares, amounts to a failure to discharge its burden of proof and accordingly no case of undervalue is made out.

[76] Reference can be made to the case of *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19, where the Federal Court through the judgment delivered by Abdul Hamid FCJ (as he then was) held as follows:

> There are however cases in which the court is not in a position to form a correct judgment without help of persons who have acquired special skill or experience on a particular subject, eg when the question involved is beyond the range of common

> experience or common knowledge or when special study of a subject or special training or special experience therein is necessary. In such cases the help of experts is required. In these cases, the rule is relaxed and expert evidence is admitted to enable the court to come to a proper decision.

[77] In *U Television Sdn Bhd & Anor v Comintel Sdn Bhd* [2017] 5 MLJ 292, the Federal Court in reference to *Syed Abu Bakar bin Ahmad v Public Prosecutor* stated as follows:

> [45] In the context of the present case we are of the view that expert evidence was required. The plaintiff's witnesses, namely PW2 and PW3 were witnesses of facts and could not be characterised as experts. It was not, but was found by the learned High Court judge, a question of accepting the testimony of plaintiff's witnesses PW2 and PW3 and disbelieving the testimony of the defendants' witnesses, DW1 and DW2, on the issues raised. There being no expert evidence, the learned High Court judge was in no position to make a determination of these technical issues.

Whether third defendant is a bona fide purchaser for value of the fifth defendant shares

[78] We find that the third defendant is a bona fide purchaser for value of the fifth defendant shares, without notice of any impediment or competing claim to the title to the fifth defendant shares.

[79] As said, the plaintiff's causes of action in the statement of claim are only targeted at the 'undervalue' sale price for the fifth defendant shares and not the first and second defendants' right to sell to the third defendant.

[80] We also find that the share sale agreement between the second defendant and third defendant is legally binding, enforceable and valid and that at all material times the third defendant acted in good faith in the execution of the share sale agreement and the purchase of the fifth defendant shares. The third defendant had conducted its own due diligence regarding the said shares and obtained the requisite warranties from the second defendant in the share sale agreement to ensure that the purchase of the shares is lawful.

[81] In addition, the fifth defendant shares are also listed and quoted on the Main Market of Bursa Malaysia Securities.

[82] The third defendant has paid the purchase price of RM0.18 for each of the fifth defendant share. The purchase price of RM23,787,269.46 for the purchase of the fifth defendant share, was paid to the second defendant by the third defendant on 22 June 2021. The third defendant is now the legally registered owner of the fifth defendant share.

[83] In the case of *Roziah binti Ismail v Johany bin Jaafar & Ors* [2018] MLJU 805, Mohamed Zaini Mazlan J (as he then was) made the following finding:

> [36] The second defendant had also conducted a due diligence on the shares pledged. They had also relied on the first defendant's representations. They had in gist taken all necessary steps.
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> [37] I accept and preferred the evidence of DW3, in that he had merely offered to help PW2, and had never given any representations to recognise the plaintiff's claim on the disputed shares. The minutes of the second defendant's board of directors' meetings also supports the second defendant's stance that they own the disputed shares, and that they did not recognise the plaintiff's claim on them.
>
> [38] The third defendant too had made the necessary enquiries prior to entering into its agreement with the second defendant. He had after all paid the full purchase price for the shares free from encumbrance, as set out in the agreement concerned. His transaction was bona fide.

Whether the sale of the fifth defendant shares at RM0.18 per share to the third respondent on 22 June 2021 is lawful under the Capital Markets and Services Act 2007 and the Malaysian Code on Take-Overs and Mergers 2016?

[84] The plaintiff claimed that the acquisition of the fifth defendant shares by the third defendant under the share sale agreement at the price of RM0.18 per share is not a premium above the market value and therefore is a contravention of the Take-Overs and Mergers Code and s 217 of the Capital Markets and Services Act 2007.

[85] The plaintiff also claimed that it is entitled to commence a civil suit to recover its losses under s 357 of the Capital Markets and Services Act 2007 and has become an 'Aggrieved Person' who is entitled to apply to court for an order restraining the third defendant from dealing in or disposing of the fifth defendant shares and an order to restrain the exercise of the voting rights in the fifth defendant shares by the third defendant under s 360 of the said Act.

[86] However, we find no evidence of any ruling from the Securities Commission that third defendant has contravened or breached any provision of the Malaysian Code of Take-Overs and Mergers 2016 or the corresponding rules.

[87] In the case *Lai Soon Onn v Chew Fei Meng and other appeals* [2019] 2 MLJ 96, Court of Appeal through the judgment delivered by Zabariah Yusof JCA (as she then was) held as follows:

> [43] Gleaning through the provisions of the CMSA, it is the intention of the Act that the bodies established under the Act are regulatory bodies and it is not the function of the court to usurp their function nor to second guess their decisions.

In *R v International Stock Exchange of UK and Ireland, ex parte Else Ltd; R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Else (1982) Ltd and another; R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Roberts* [1993] 1 All ER 420; [1993] QB 534, Lord Bingham observed that 'the court will not second guess the informed judgment of responsible regulators steeped in knowledge of their particular market. This court applied the same principle in Shahidan Shafie in arriving at its decision when interpreting s 153 of the SCA. To interpret otherwise would result in a situation where there would be two decisions, one of the courts and the other from the SC. That cannot be the position in law (refer to para 29 of *Shahidan Shafie*. The courts have shown a reluctance to interfere with the decision of regulatory bodies in carrying out its objective in the absence of ma/a fide or acting in excess of jurisdiction. Asimilar stance was taken by this court in *Bursa Malaysia Securities Berhad* and also in *Khiudin bin Mohd & Anor v Bursa Malaysia Securities Bhd and another application* [2012] 6 MLJ 131 which had referred to various commonwealth jurisdictions, which demonstrated the attitude of the courts in reviewing the decision made by the regulators in different jurisdictions. Therefore, it is not within this court's jurisdiction to interfere with the duties mandated to the market regulatory bodies in maintaining and promoting the interests of the public in dealing on the exchange and these bodies should be left to carry out its objective as stipulated under the Act.

[44] Therefore, a person who has suffered loss or incurred damage may institute a civil action to recover the amount of the loss or damage after a contravention of any provision or any regulations made under the CMSA has been determined by the SC. It is not necessary tor the courts to adjudicate whether there is a contravention of the Act before s 357(1) of the CMSA can be applied. All that is required is tor the SC first to determine whether there was a contravention.

[88] In *Shahidan bin Shafie v Atlan Holdings Sdn Bhd & Anor* [2015] MLJU 1944, the Court of Appeal through the judgment delivered David Wong JCA (as he then was) held as follows:

[27] It is our view that premised on the aforesaid provisions, it can be said that it is the intention of Parliament for the Securities Commission to be tasked to supervise, regulate, issue rulings from time to time and enforce the practices of companies bound by the SC Act 1993 and the Take-Over Code. The learned judge in the High Court in fact found that the only remedy available to the plaintiff was to complain to the Securities Commission about the conduct of the defendants and if the Securities Commission failed to act or makes a ruling unfavourable to the plaintiff, his only option was to apply to the court tor judicial review of the decision of the Securities Commission. In short, the plaintiff's remedy was one of public law.

[30] If we were to adopt the interpretation of s 153 of the SC Act of the plaintiff, it would amount to the court stepping into the shoes of the Securities Commission which is tasked to supervise and regulate the conduct of companies. As we have said earlier, that is not and cannot be the intention of Parliament. Our interpretation reconciles s 153 with the other provisions in the SC Act and that is the private cause of action for breach of statutory duty is preserved to the extent only after the Securities Commission has made a specific ruling. This would avoid a situation

where there would be two decisions, one of the courts and the other the Securities Commission. This scenario would bring uncertainty to the business world which must be avoided. Our interpretation allows only one decision at one time and that is the decision of the Securities Commission until the same is either set aside or substituted by the courts.

[89] Accordingly, before a claim under s 357 of the Capital Markets and Services Act 2007 can be filed, there must first be a ruling from the Securities Commission that there is a contravention of the relevant provision or regulations made under the said Act. It is not the duty of the court to usurp the function nor to guess the decisions of the Securities Commission.

[90] However, PW2 gave evidence that the Securities Commission had made a finding that the plaintiff complaint lodged by them in their letter dated 28 January 2022 and 15 February 2022 to be unsubstantiated. This had seriously weakened the probative force of the plaintiff's case.

[91] In the upshot, based on the Court of Appeal cases of *Lai Soon Onn v Chew Fei Meng and other appeals* and *Shahidan Shafie v Atlan Holdings Sdn Bhd & Anor*, the learned judicial commissioner had correctly held that plaintiff's claim founded on the provisions of Capital Markets and Services Act 2007 in this case is unsustainable. We share the same view and fully agree with the decision made by the learned judicial commissioner.

Whether in law, the first defendant was time-barred for failing to register the UK judgment within a period of six years from the date of obtaining the UK judgment?

[92] The plaintiff has never pleaded this issue in their statement of claim nor do they form part of the plaintiff's causes of action against the defendants.

[93] With respect, we find that the first defendant was not time barred for failing to register the UK judgment. The Reciprocal Enforcement of Judgment Act 1958 will only be applicable in the event a party wishes to take enforcement proceedings of a foreign judgment in Malaysia. Such enforcement proceedings will be in the nature of the usual execution proceedings under O 45 of the Rules of Court 2012.

[94] The plaintiff is misconceived in raising such a contention. On the facts of the present case, the first and/or second defendants are just exercising their rights under the share charge agreement (eg cll 3.3, 3.7, 7.1 and 8.2) and the charge supplement and not based on the UK judgment.

Others related issues

[95] Finally, there are also other ancillary issues submitted in the course of the respective submission by both parties. However, we are not inclined to dwell on any of them. Our views on them would have no effect on our above finding.

CONCLUSION

[96] In *Dr Yang Xin Ha & Anor v Dato' Dr Nellie Tan Swee Lain & Ors* [2018] MLJU 1180 Abu Bakar Jais J (as he then was) held as follows:

> [37] As explained, essentially the plaintiff have not discharged the burden of proving their case when they closed their case. At that stage the first defendant is not obliged to bring any evidence to answer the plaintiffs' case. Therefore, the first defendant had correctly submitted no case to answer.

[97] Having appraised ourselves of all the above established and entrenched legal principles and the relevant provision of the law, the appeal records, evidence given by the plaintiff witnesses, written and oral submissions of parties, the grounds of judgment by the learned judicial commissioner after full trial, it is our considered views that the plaintiff has failed to prove the strength of their claim.

[98] Consequently, we see no necessity for us to allow parties to 'revisit' or make submissions in Appeal 441 as all the issues of law raised in that said appeal had been fully canvassed and deliberated in Appeal No 511.

[99] In the premises, we unanimously find no appealable error in the learned judicial commissioner's decision in dismissing the plaintiff's claim. Hence, it leaves no leeway for appellate interference.

[100] The plaintiff's Civil Appeal No W02(NCC)(W)-411–03 of 2022 is dismissed with cost of RM5,000 to be paid to the first defendant (with second defendant) subject to allocatur fees.

[101] The plaintiff's Civil Appeal No W02(NCC)(W)-511–03 of 2023 is dismissed with cost of RM20,000 to be paid to the first defendant (with second defendant) subject to allocatur fees.

Appeal dismissed.

Reported by Ashok Kumar